

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209232

DATE: June 27, 1983

MATTER OF: Talley Support Services, Inc.

DIGEST:

1. Protest by incumbent that certain acceptable quality levels required by the solicitation have never been achieved consistently, and that this fact was not made known to potential bidders, is denied. GAO will not object to a contracting agency's judgment that a specification is necessary and practicable absent clear and convincing evidence to the contrary, since the responsibility for drafting proper specifications is the contracting agency's. The fact that protester-incumbent has not achieved certain performance requirements does not establish that the agency's judgment of its needs is incorrect. Further, GAO knows of no legal requirement for the agency to have revealed incumbent's actual performance record to other prospective bidders.
2. Protest that data used in solicitation is misleading and incomplete is denied, where agency relates that earlier data is more reliable than current data furnished by protester, the incumbent contractor, and agency further advises that more recent data was furnished to all prospective bidders in form of attachment to minutes of pre-bid conference.
3. Provision in solicitation allowing for equitable price adjustment should anticipated workload increase or decrease 15 percent was not improper, as provision affects all potential bidders equally, and the fact that bidders may respond to the risk of workload deviations differently in calculating their bid prices is a matter of business judgment that does not preclude a fair competition.

025996

4. Government is under no legal obligation to eliminate risk from a procurement entirely. Although specifications must be unambiguous, state minimum needs accurately, and provide for equal competition, prospective bidders are expected to take attendant risks into account when preparing their bids.

Talley Support Services, Inc. protests the award of any contract under invitation for bids (IFB) No. F34650-82-B-0094 issued by the Department of the Air Force for motor pool operations and vehicle maintenance at Tinker Air Force Base, Oklahoma. Talley contends that the solicitation contains certain elements that subject potential bidders to unfair surprise and unconscionable risk. .

We deny the protest.

The solicitation was issued on August 31, 1982. Talley, the incumbent contractor, attended a pre-bid conference with other prospective bidders on September 15, at which time various issues concerning the solicitation were raised and discussed. Dissatisfied with the results of that conference, Talley protested to this Office on September 24, declining to submit a bid by the opening date of October 20. We are informed that award of the contract has been made.

Talley contends that certain elements of the solicitation are inherently deceptive as to the true risks and workloads to be associated with the proposed contract. Talley alleges that, as the incumbent, its superior knowledge of the costs and risks involved effectively denies it a chance to compete on an equal basis. Talley's specific grounds regarding the elements of the solicitation at issue are analyzed below.

Technical exhibit 12 of the solicitation, Performance Requirements Summary, lists the contract requirements considered most critical to acceptable contract performance; shows the maximum allowable degree of deviation from

acceptable quality levels before contract performance is considered unsatisfactory; shows the percentage of total contract price that each requirement represents; explains the quality assurance methods used by the Government to evaluate contractor performance; and defines the procedure by which the Government will reduce the contractor's monthly payment if contract performance is unsatisfactory. Talley alleges that this provision of the solicitation violates Air Force Regulation (AFR) 400-28, para. 2-7(b), September 26, 1979, which provides that "acceptable quality levels must equal but not exceed the standards met when the Air Force performs the service in-house." Talley urges that the acceptable quality levels for certain requirements have never been achieved consistently by either the Air Force or the incumbent (Talley), and that the solicitation does not state this fact. Talley states that the Air Force's "stringent" acceptable quality levels will add 5 to 15 percent to the total cost of the contract, a factor not apparent to other prospective bidders who allegedly believe the requirements to reflect standard performance expectations, and will therefore underestimate performance costs in their bids.

In the Air Force's view, however, the quality levels identified as acceptable in fact reflect standard expectations that bidders are entirely capable of reflecting in the business judgment that is part of bid preparation and calculation. The Air Force states that there were no applicable quality levels for technical exhibit 12 requirements when those services were performed in-house. The Air Force notes that quality levels as now established in technical exhibit 12 are based upon command directives and prior in-house performance records, or can be established by management decision. It is the Air Force's position that AFR 400-28, para. 2-7(b), merely provides that the Air Force cannot demand a greater quality level from a contractor than the Air Force would itself provide if performing the service in-house.

We see nothing unfair in the Air Force's establishment of acceptable quality levels without also warning bidders that levels were not established when the Air Force performed the function itself, or that the prior contractor was unable to meet the levels now established. First, we see no reason to question the Air Force's explanation of

its own regulation, that is, that it only cannot demand that the contractor perform better than would the agency itself.

Moreover, the responsibility for drafting proper specifications to meet the Government's minimum needs is the contracting agency's, Rack Engineering Company, B-208615, March 10, 1983, 83-1 CPD 242, and the basic drafting rule is only that the specifications must be unambiguous, state the needs accurately, and provide for equal competition, Klein-Sieb Advertising and Public Relations, Inc., B-200399, September 28, 1981, 81-2 CPD 251. Here, prospective bidders clearly were on notice of what would be expected of them during contract performance, and presumably each is knowledgeable enough to recognize the effort and risks associated with that expectation. The fact that Talley has not been able to meet certain performance requirements does not establish that they are deceptively burdensome on the contractor, see ConDiesel Mobile Equipment Division, B-201568, September 29, 1982, 82-2 CPD 294; John Bransby Productions, Ltd., B-207968, September 30, 1982, 82-2 CPD 243, and we know of no legal requirement for an agency to reveal the incumbent's actual performance record to other prospective bidders. Under the circumstances, we cannot conclude that the competition will be unfair for the reason argued by Talley.

Talley also protests that technical exhibits 7 and 8 of the solicitation, Workload Data for Vehicle Operations and Vehicle Maintenance, rely upon non-current 1979 data which is misleading, and that complete data needed for bid preparation has not been provided. The Air Force relates that the 1979 data was considered to be more accurate than more recent data supplied by Talley, which allegedly is inflated because Talley has purchased parts from a sole-source supplier at a minimum 15 percent mark-up. The Air Force has concluded that Talley's unverifiable current data is not necessarily the most desirable for bidding purposes, and that the 1979 data, properly adjusted to today's costs, is more accurate. In any event, the Air Force states that additional data from the period August 1981 through July 1982 was supplied to all prospective bidders in the form of an attachment to the minutes of the pre-bid conference.

From the record, we cannot conclude that the data relied upon in technical exhibits 7 and 8 is necessarily incomplete or misleading, or that the requirements of the solicitation are not based upon the best available information. Talley has not shown that the 1979 data is inaccurate, nor has it shown that the additional data supplied to all prospective bidders did not provide a complete basis for the preparation of a well-informed bid. This aspect of Talley's protest is without merit. G & B Packing Company, Inc., B-204192, April 20, 1982, 82-1 CPD 359.

Special provision H-011 of the solicitation, Variation in Workload, provides that if certain work orders, fleet dispatches and workloads vary above or below 15 percent from the total estimated contract workload, then negotiations for an equitable price adjustment will be initiated. Talley urges that the solicitation does not accurately reflect that certain maintenance costs are highly variable. Therefore, Talley complains, a contractor's overall cost could increase 20 to 30 percent without any assurance that an equitable price adjustment could be made.

We find no merit to Talley's position. As the Air Force correctly points out, the intent of the variation in workload clause is to enable the contractor or the Government to seek an equitable adjustment in the event of a catastrophic change in workload. The amount that a bidder's price should include to protect the bidder from normal workload variations would be based upon the amount of risk that the bidder is willing to assume, based upon the information provided by the Government. It is fundamental that the mere presence of risk in a solicitation does not make the solicitation inappropriate. Diesel-Electric Sales & Services, Inc., B-206922, July 27, 1982, 82-2 CPD 84. The provision affects all potential bidders equally and, in our view, the fact that bidders may respond to risk differently in calculating their prices is a matter of business judgment that does not preclude a fair competition. See Applied Devices Corporation, B-199371, February 4, 1981, 81-1 CPD 65.

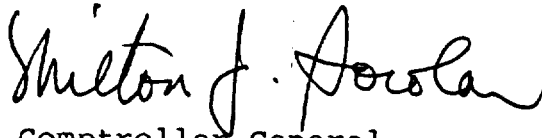
Finally, paragraph 3.6 of the Statement of Work in the solicitation provides that the Government will supply the contractor with repair parts for special purpose and M-series vehicles if those parts are only available through Government supply channels. Based upon its experience as the incumbent, Talley contends that this has not been the effective result. Talley urges that paragraph 3.6 essentially restricts the contractor from access to the Government supply system, forces the contractor to pay sole-source suppliers inflated prices for special purpose parts, and exposes the contractor to the risk of long delays in delivery from suppliers. Talley complains that these problems make it almost certain that the acceptable quality levels of technical exhibit 12 will be violated.

We find no merit in Talley's argument. The Air Force specifically addressed bidder concerns on the parts issue at the pre-bid conference. It is clear from the record that potential bidders were on notice that parts acquisition was the contractor's ultimate responsibility, and that the intent of paragraph 3.6 was to make Government-supplied parts available only after the contractor had made every reasonable effort to obtain parts through normal commercial channels. Moreover, we have no basis to question the Air Force's position that the contractor's risk will be minimized by the use of sound acquisition policies, which the agency suggests may not have been implemented by Talley in performing the previous contract.

Under the circumstances, we cannot find that Talley's prior experience as the incumbent necessarily would have put it at an improper competitive disadvantage with respect to this matter. Again, we stress that the Government is under no legal obligation to eliminate risk from a procurement entirely; bidders are expected to exercise business judgment and take such risks into account when developing their bids. Cincinnati Bell Telephone Company, B-207177, January 17, 1983, 83-1 CPD 41. As stated above, the basic rule for solicitation requirements is that they must be unambiguous, state minimum needs accurately, and provide

for equal competition. Klein-Seib Advertising and Public Relations, supra. We find nothing to indicate that paragraph 3.6 of the Statement of Work, as elaborated on by the Air Force at the pre-bid conference, does not meet the above standard.

The protest is denied.

for 
Comptroller General
of the United States